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the phrase, taking the words in the early common-law meaning, then the person (engaged in interstate commerce) who sold out his business and agreed not to compete with his vendee was intended by Congress to be treated as a criminal; likewise, of every person (engaged in interstate commerce) who entered into any contract calling for his exclusive services; likewise, of the members of a labor union (engaged in interstate commerce) who agreed between themselves not to work more than a specified number of hours a day. It would be easy to multiply examples which make it seem very unreasonable to suppose that Congress used the phrase in the early common-law meaning.

This is made even plainer if we consider the closely associated question of the interpretation of the word "monopolize." A monopoly, as that word was used in the early common law, meant an exclusive control of some branch of trade through royal grant. In 1890, the only things in the United States analogous to monopolies in this sense were patents and copyrights. Congress did not intend to treat as criminals persons (engaged in interstate commerce) who controlled patented or copyrighted articles. This word was used with a sinister connotation, — to indicate acquiring control of some part of interstate commerce by improper means. As indisputably "monopolizing" is not used in its early common-law meaning, but is used with a sinister connotation, it is reasonable to suppose that Congress may have used the phrase "in restraint of trade" with a sinister connotation, and not in its early common-law meaning.

On this construction of the statute — which, by reason of these considerations, seems to be plainly the proper construction — it becomes the duty of the court to examine the facts of each case, and to determine whether the acts alleged to be "in restraint of trade" are to the detriment of trade. This is precisely the manner in which the court approached the problem in the principal case.

The court, however, used one sentence which may come back to give trouble. "The true test of legality," it said, "is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." The Anti-Trust Act condemns acts which are in restraint of "trade," not acts which are in restraint of "competition." The thought that "competition is the life of trade" has received such wide acceptance that, it is submitted, the court might wisely adopt a secondary rule, for the construction of the Anti-Trust Act, to the effect that acts which limit the freedom of competition (including internal competition) shall be treated as, *prima facie*, acts which are to the detriment of trade. But a cessation of competition *may* conceivably be to the advantage of trade, — may make for more trade rather than less trade, and may produce this beneficial result without the infliction of hardship upon anyone.

PROXIMATE CAUSE. — NEGLIGENT OMISSION OF DUTY AS INTERVENING ACT. — The question of proximate causation is often so complicated with questions of negligence and of "last clear chance" as to be difficult of solution without careful analysis. The general legal principles

governing proximity of causation are neither complex nor difficult. Proximity and remoteness are terms conditioned upon distance in the "propulsion of cause on cause"¹ rather than upon distance in time or space. If between a given cause and a given result no new cause comes in to influence the action of the former cause the result must of course be proximate; that is, a direct result is always proximate.² If however a second cause intervenes to combine with the first cause, and thus to change its course and affect the nature of the result, the second cause must in some way be so related to the first, linked up with it, as to make the first cause responsible for the interference of the second cause with the nature of the result. This relation of the two causes may be established by showing that the second cause was actually brought into action by the first; as for instance by inviting the action of the second cause,³ or by calling it into existence as a defense against the action of the first cause, or against its further consequences.⁴ Thus, the publisher of a newspaper is responsible for a purchase by a reader of the paper of goods he advertises, since he advises it;⁵ one who unlawfully attacks another is responsible for the effect of an act in self-defense;⁶ and one who sets a fire is a proximate cause of injury incurred in the effort to extinguish it.⁷ On this ground, too, one who inflicts a physical injury is a proximate cause of an injury inflicted by a surgeon in the effort to cure.⁸ Another and more frequent way in which the relation between the two causes may be established is by showing that the first cause created an appreciable risk of concurrence with the second cause. This is usually expressed by the common phrase that the intervention of the second cause must be foreseeable;⁹ though there are cases where the foreseeability of the second cause is not of itself enough to make the first cause a proximate cause of the result.¹⁰

That a failure to perform a legal duty may constitute a cause equally with a positive act is clear;¹¹ and it may therefore be a second cause cooperating with a positive act or another failure of duty to bring about a result.¹² It seems, however, that a failure to act can never so influence

¹ BACON'S MAXIMS, Reg. 1.

² *Lynn Gas & Electric Co. v. Meridan Ins. Co.*, 158 Mass. 570, 33 N. E. 690 (1893); *McCahill v. New York Transp. Co.*, 201 N. Y. 221, 94 N. E. 616 (1911); *Romney Marsh v. Trinity House*, L. R. 5 Ex. 204 (1870).

³ *Guille v. Swan*, 19 Johns. 381 (1822).

⁴ *Clark v. Chambers*, 3 Q. B. D. 327 (1878); *Eckert v. Long Island R. R.*, 43 N. Y. 502 (1871); *Maclean v. Segar*, [1917] 2 K. B. 325.

⁵ *Rex v. De Marny*, [1907] 1 K. B. 388.

⁶ *Ricker v. Freeman*, 50 N. H. 420 (1870); *Bloom v. Franklin Ins. Co.*, 97 Ind. 478 (1884); *Scott v. Shepherd*, 2 W. Bl. 892 (1773).

⁷ *Illinois Central R. R. v. Siler*, 229 Ill. 390, 82 N. E. 362 (1907).

⁸ *Com. v. Hackett*, 2 Allen (Mass.) 136 (1861); *Sauter v. New York, etc. R.R.*, 66 N. Y. 50 (1876).

⁹ *Derry v. Flitner*, 118 Mass. 131 (1875); *Gilman v. Noyes*, 57 N. H. 627 (1876); *Fairbanks v. Kerr*, 70 Pa. 86 (1871); *Harrison v. Berkeley*, 1 Strobb. (S. C.) L. 525 (1847).

¹⁰ *Denny v. New York Central R. R.*, 13 Gray (Mass.) 481 (1859); (but see *Green-Wheeler Shoe Co. v. Chicago, etc. Ry.*, 130 Iowa, 123, 106 N. W. 498 (1906)); *Graves v. Johnson*, 179 Mass. 53, 60 N. E. 383 (1901); *Admiralty Commrs. v. The Amerika*, [1917] A. C. 38.

¹¹ *Regina v. White*, L. R. 1 C. C. 311 (1871); *Regina v. Instan*, [1893] 1 Q. B. 450.

¹² *Regina v. Lowe*, 3 C. & K. 123 (1850); *Washington, etc. R. R. v. Hickey*, 166 U. S. 521 (1897).

the course of events set up by a prior cause as to make the latter remote from the result of it.¹³ The one subject to the duty ought to act, and thereby put an end to the force started by the original actor, or so deflect the force as to prevent the injurious result. By failing to act and to intervene in the course of events, he allows the force of the original actor to continue unchecked and undeflected until it directly results in the injury complained of. The failure to act, instead of interfering with the operation of the original force, has wrongly failed to do so.

A recent case in the Supreme Court of the United States, *Union Pacific Railroad Co. v. Hadley*, 38 Sup. Ct. 318, brings out this point very neatly. A brakeman, injured by a rear-end collision, had neglected his duty of going back to signal the following train. It was held that the negligence of the company in running the following train was a proximate cause of the injury, and the brakeman was allowed to recover upon the Federal Employer's Liability Act. This decision, in view of the considerations stated above, seems to be thoroughly sound even though, as Mr. Justice Holmes pointed out, the negligence of the brakeman should be deemed "the logical last."

It is to be noticed that in such a case, in spite of the fact that the defendant is a proximate cause of the result, an individual plaintiff who has neglected to act as he should do is usually barred from recovery because of his own contributory negligence or because the consequence in question was avoidable. In the case under discussion the plaintiff would be barred from recovery if the Employers' Liability Act had not abolished the defense of contributory negligence.

THE VIRGINIA-WEST VIRGINIA DEBT CONTROVERSY. — The Supreme Court has left open a point of exceptional interest in holding over for reargument the rule requiring West Virginia to show cause why in default of payment of the judgment in favor of Virginia an order should not be entered directing the levy of a tax by the legislature, and a motion by West Virginia to dismiss the rule.¹ The decision by the chief justice points out that Congress as required by the Constitution ratified the agreement by which West Virginia assumed its proportional share of the debt of Virginia and indicates his opinion that under the doctrine of *McCulloch v. Maryland*² Congress has the power to enforce its performance. But in the absence of congressional action has the Supreme Court power to mandamus the legislature of West Virginia to levy a tax to pay its obligation? The argument in the affirmative suggested by the court, is that the grant to the judicial power of jurisdiction to determine controversies between two or more states must have been an effectual grant, and that the power to pronounce judgment must include the power to enforce the judgment. But such reasoning though persuasive is not conclusive. Words have no absolute meaning, but

¹³ *Regina v. Holland*, 2 Moo. & R. 351 (1841).

¹ *Commonwealth of Virginia v. State of West Virginia*, 38 Sup. Ct. 400 (1918).

² 4 WHEAT. 316 (1819).